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No. 80-1883.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

JOHN GARGANO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Brief of Petitioner, John Gargano.

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Table of Authorities Cited.

Cases.

Dunn v. United States, 442 U.S. 100 (1979)	2
Sandstrom v. Montana, 442 U.S. 510 (1979)	2

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The issue raised by petitioner in his petition for certiorari has been squarely met by the Government in its brief in opposition. The Government contends that in a *criminal* tax case, the prosecution satisfies its burden of proof beyond a reasonable doubt as to all the elements of the crime simply by proving the receipt of "unreported funds" plus the existence of circumstances "from which the jury *could infer* that these amounts represented" income. The Government contends that once the Goverment has proved this, "it [is] up to petitioner . . . to submit evidence that would show that the payments were not" taxable income (G.B. at 5).

The issues are thus squarely presented to this Court for review:

A) Does the Government satisfy its burden of proof in a criminal tax case by simply proving receipt of unreported funds plus "circumstances" from which the jury "could infer" that it was income? This is not the law, especially in a case — like this one — where the receipt of the funds is openly acknowledged and recorded. The Government's position would shift the burden of proof on both crucial elements of the crime: 1) that the funds *were* taxable income; and 2) that the defendant *believed* they were income and intended to defraud the Government. There is simply no evidence in the record below — and neither the Government nor the Court of Appeals cites any — proving either of these elements. The Government cannot — in a criminal case — substitute inferences and presumptions for evidence of the crucial elements of the crime. See *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

B) Even if the present Government's contention were correct — which it is not — that was not the theory on which the case was presented to the jury by the trial court. As demonstrated in the petition, the trial court's rulings — and the trial prosecutor's theory — were exactly to the contrary of the approach taken by the Court of Appeals and by the Government in this Court. The Government cannot shift its theory of the case in the appellate courts. See *Dunn* v. *United States*, 442 U.S. 100 (1979).

Accordingly, petitioner respectfully requests that the petition be granted so that these and the other important issues presented therein can be resolved.

Respectfully submitted,

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